

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:)
)
APPLICATION OF MEMPHIS)
NETWORK, LLC FOR A CERTIFICATE)
OF PUBLIC CONVENIENCE AND)
NECESSITY TO PROVIDE INTERSTATE)
TELECOMMUNICATION SERVICES)
AND JOINT PETITION OF MEMPHIS)
LIGHT, GAS & WATER DIVISION,)
A DIVISION OF THE CITY OF)
MEMPHIS, TENNESSEE ("MLG&W"))
AND A&L NETWORKS-TENNESSEE,)
LLC ("A&L") FOR APPROVAL OF)
AN AGREEMENT BETWEEN MLG&W)
AND A&L REGARDING OWNERSHIP)
OF MEMPHIS NETWORK, LLC.)

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DOCKET NO. 99-00909

**BRIEF FILED ON BEHALF OF INTERVENOR, INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1288**

International Brotherhood of Electrical Workers, Local 1288, ("IBEW") Intervenor in the above docket, pursuant to the Order of the Pre-Hearing Officer reflecting the action taken at the May 2, 2000, Status Conference, submits its brief on the legal issues in this Docket.

PRELIMINARY STATEMENT

This Brief addresses the nine issues set forth in the Report and Recommendation of the Pre-Hearing Officer dated March 9, 2000. Issues 1, 2, 3, 6, 7, 8, and 9 are essentially issues of fact that must be addressed at the hearing of this matter. Issues 4 and 5 are mixed issues of law and fact that will be specifically addressed herein. Additionally, the IBEW seeks to raise the following issues:

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1) issues concerning the effect of this venture on the Memorandum of Understanding between Memphis Light Gas and Water ("MLG&W") and the IBEW; 2) issues of the expertise of the Applicant and Joint Petitioners in the telecommunications business; 3) issues concerning the financial strength of the Applicant and Joint Petitioners for the proposed venture; and 4) issues as to whether the proposed venture is in the public interest. These latter issues are issues of fact that must be addressed at the hearing.

ISSUE NO. 4

DOES MLG&W'S INTEREST IN MEMPHIS NETWORKS LLC VIOLATE ARTICLE 2, SECTION 29 OF THE TENNESSEE CONSTITUTION?

Article 2 § 29 of the Tennessee Constitution provides in pertinent part as follows:

the credit of no County, City or Town shall be given or loaned to or in the aid of any person, company, association or corporation, except upon the election to be first held by the qualified voters of such county, city or town, in the assent of three-fourths of the votes cast at said election. Nor shall any county, city or town become a stockholder with others in any company, association or corporation except upon a like election, and the assent of the majority.

It is clear from the facts developed in this matter that MLG&W has become a member of Memphis Networkx, LLC, a Tennessee Limited Liability Corporation. The other member of the corporation at this time is A&L Networkx-Tennessee, LLC, a privately owned, limited liability company organized and existing under the laws of Kansas. If MLG&W is a City or Town within the meaning of Article 2 §29, MLG&W's interest in Memphis Networkx must be approved by a vote of the citizens of Memphis.

MLG&W is a Division of the City of Memphis. MLG&W has acknowledged this in the Memorandum of Understanding between it and IBEW Local 1288 (attached hereto as Exhibit 1).

In the introductory provision of the Memorandum of Understanding, Page 5, it is stated:

Whereas, the City of Memphis, Tennessee, owns and operates its electric, gas and water systems and is engaged in supplying services to its public schools, parks, playgrounds, streets, hospitals, public buildings, and in serving the public, these services being vital to the public health and welfare, . . .

MLG&W, therefore, does not own or operate its facilities. Rather, these facilities are owned and operated by the City of Memphis. MLG&W is not a “quasi”-public corporation. It is a division of, and an asset of, the City of Memphis. Therefore, even though MLG&W may have no specific taxing authority, it is obvious that its financial operations ultimately impact the City of Memphis and thus, its taxpayers. If for example, MLG&W was to become insolvent, who would ultimately be responsible for its debts? Even though MLG&W has authority to schedule rates for its services, ultimately, by virtue of its ownership by the City of Memphis, the taxpayers stand behind its obligations.

That MLG&W is a City was recognized by the United States District Court in the case of *Booker Jones, et al. Vs. Memphis Light, Gas & Water Division*, 642 F.Supp. 644 (W.D. T.N. 1986). This case involved a lawsuit brought by employees of MLG&W against it, attacking certain provisions of a voluntary affirmative action plan adopted by MLG&W. In its opinion, Judge Odell Horton, U.S. District Court Judge, found that “two male black employees, two male white employees and the International Brotherhood of Electrical Workers Local No. 1288 (“Union”) brought suit against the Memphis Light, Gas and Water Division (“MLG&W”), *a municipal corporation* . . . (emphasis added).

Though an explanation of which government entities are denoted by the terms “county,” “city,” and “town,” is not provided within Article 2, Section 29 itself, the government entities to which the terms apply can be determined by the conditions and circumstances established in the precedent case *The Eye Clinic, et al. v. Jackson-Madison County General Hospital, et al.* 986 S.W. 2d 565 (Tenn. Ct. App. 1998). Essentially, the distinction between those government entities which should be classified as cities and those government entities which should not, depends upon the economic bond between the municipality and the government entity. Upon realizing that Madison County’s financial relation to the Hospital was such that Madison County ““was authorized to appropriate’ funds to commence operations and pay operating deficits” but that it was “not obligated to do so,” the Court in *Eye Clinic* determined that there was not a significant financial relationship between the County and Hospital. The Court thereby decided that the Hospital was not prevented by Article II from loaning its credit to a private company.

In the case of *Cleveland Surgery Center, et al. v. Bradley County Memorial Hospital*, 1999 Tenn. App. LEXIS 196, the issue was raised once again as to whether Article 2, Section 29 should be applied to a county hospital seeking to enter an economic venture with a private hospital. In this case, the court set out to determine the economic relation between Bradley County and the Hospital according to the conditions and circumstances established by *Eye Clinic*. In *Cleveland Surgery Center*, the court recognized the following:

In *Eye Clinic*, the Private Act merely *authorized* Madison County to appropriate funds to commence operations and pay operating deficits; *it was not obligated* to do so. This factual and legal conclusion essentially controlled the disposition of the case.

The determination above, in conjunction with the fact that the Hospital and Bradley County did have a binding economic relationship, led the court to determine that there was in fact a significant and

binding bound between County Hospital and Bradley County. As a result of a determination on the primary issue of whether a significant economic relation exists, the Court ruled that County Hospital was a County as referenced in the Article and was thereby precluded from lending its credit to any private corporation.

The cases of *Eye Clinic* and *Cleveland Surgery Center* established that whether a government entity falls under the restriction of Article II Section 29 is dependant primarily upon the economic relationship between the county/city/town and the government entity. So, in order to determine whether MLG&W is subject to Article II Section 29, it should be determined what economic relation exists between the City of Memphis and MLG&W.

Though the cases of *Eye Clinic* and *Cleveland Surgery Center* provide an economic principle by which to determine whether a government entity falls under the article, it should not be assumed that the same material facts that were sought in the two precedent cases should also be sought for the instant case in order to understand whether MLG&W is a City. Only two factors are necessary to establish that MLG&W is a government corporation that falls under the limitations provided by the article. Those two factors are:

1. MLG&W provides energy and water which are integral components of the infrastructure of a modern economy of any county/city/town, and
2. MLG&W is the *only* provider of these resources.

The fact that MLG&W provides a service that is necessary to maintain a modern economy does make it similar to the cases of *Eye Clinic* and *Cleveland Surgery Center* in which the government entities provided the necessitated benefit of health care. However, the distinction between the instant case of MLG&W and the precedent cases is that, unlike the county hospitals, MLG&W is the sole

provider of its particular modern day necessity. Given MLG&W's essentially monopolistic form and the fact that it is a municipal corporation, the City of Memphis is necessarily obligated to maintain MLG&W at whatever cost should it fall into financial hardships. And thereby, there exists a definite and significant economic bond between the City of Memphis and the municipal corporation, MLG&W, that prevents MLG&W by Article II Section 29 from lending its credit to a private corporation since such lending would allow for too great of a direct association of the economic interest of the public and the financial interest of a private corporation.

The IBEW has also not had an opportunity to discover whether the City of Memphis has in fact obligated itself on any bond issues or other indebtedness with MLG&W. If in fact the City has done so, this would be further indicia that taxpayer money is at risk.

Based upon the above, it is respectfully submitted that the entry by MLG&W into the joint venture is in violation of Article 2, Section 29 of the Tennessee constitution, and is an ultra vires act.

ISSUE NO. 5

TO WHAT EXTENT, IF ANY, IS MLG&W'S PARTICIPATION AS A MEMBER OF MEMPHIS NETWORK, LLC, IN THE PROPOSAL TO OFFER TELECOMMUNICATIONS SERVICE EFFECTED BY ITS CHARTER OR THAT OF THE CITY OF MEMPHIS

MLG&W, in its Brief filed herein relies upon T.C.A. §7-52-103(d), which is a grant of authority to municipalities to participate in telecommunications joint ventures. It further states that this statute delegates any authority to approve the proposed joint venture to MLG&W's Board of Commissioners, which has approved the venture. IBEW respectfully submits, however, that the

MLG&W/City of Memphis Charter requires that this venture must be approved by the Memphis City Council.

Section 681 of the MLG&W/City of Memphis Charter requires that contracts over \$5,000.00 be approved by the City Council. As noted by MLG&W in its Brief, the City Council in 1985 passed Ordinance No. 3509, providing that, in lieu of approval of individual contracts and salaries, the City Council can approve the budget established by the MLG&W Board of Commissioners. On December 7, 1999, the Memphis City Council approved the MLG&W budget for the year 2000. This budget includes the electric division loan to the telecommunications division in the amount of \$20,000,000.00. MLG&W argues that pursuant to Ordinance 3509, this approval was sufficient, and that individual contracts regarding the disbursement of the \$20,000,000.00 do not need to be approved.

IBEW respectfully submits, however, that this is contrary to the intent of Ordinance 3509. This ordinance obviously was intended to apply to contracts and salaries of MLG&W created in the normal course of its business operations, viz. work contracts, purchase contracts, salaries, etc. The obvious purpose of this ordinance was to alleviate the burdensome requirement of having every salary and contract approved by the City Council. This Ordinance does not apply, however, to a \$20,000,000.00 investment in a private entity with a private corporation, as is the case here. Such an investment is not in the normal course of business and, it is submitted, Ordinance 3509 does not apply to a contract of such a magnitude. Thus, Section 689 of the MLG&W/City of Memphis Charter applies to this venture and requires the approval of the City Council for the investment by MLG&W in Memphis Networx, as well as approval of the Operating Agreement.

Furthermore, the interdivisional loan of \$20,000,000.00 from the Electric Division to the Telecommunications violates the provisions of Sec. 689 of the MLG&W/City Charter. This provision provides as follows:

Notwithstanding any other provisions of this Act, the moneys and funds of any division (electric, gas and water) from time to time may be loaned to another division in such amounts and upon such terms as the board of light, gas and water commissioners may authorize and approve; provided, that no such loan shall be made by any division in excess of the principal sum of \$100,000.00, nor which will increase the aggregate principal amount of any loan or loans then owing to the lending division by the borrowing division to more than \$100,000.00, unless the board of commissioners of the City of Memphis shall first approve the same by resolution. (Priv. Acts, 1939, ch. 381, § 17)

As can be seen, Sec. 689 provides that the City Council, by resolution, must specifically approve any interdivisional loan more than \$100,000.00. This did not occur in the instant case. The \$20,000,000.00 loan was merely a line item of the overall budget that was approved by the City Council. The above Charter provision requires that such a loan be approved by a specific resolution, not just as a line item in a budget.

At first blush it would appear that Sec. 689 has been amended by Ordinance No. 3054. This ordinance states that: "Notwithstanding any provision of the Charter, the monies and funds of any division may be loaned to another division in such amounts and upon such terms as the Board of Light, Gas and Water Commissioners may authorize and approve." This provision would seem to allow the joint venture without the approval of the City Council. As if evidenced by the preamble of Ordinance No. 3055, however, it was passed to modernize MLG&W and add flexibility in its organization to deal with new energy systems, such as artificial gas, solar, etc. This ordinance, therefore, dealt with energy systems, and was the proper and only context in which the allowance of interdivisional loans by the ordinance must be placed. Since the interdivisional loan in this matter

was for purposes of going into the telecommunications business with a private entity, not for the creation of new energy sources or energy systems, these provisions do not override those of Sec. 689, which require such interdivisional loans above \$100,000.00 to be approved by a resolution of the City be approved by a resolution of the City Council.

The so-called approval of \$20,000,000.00 interdivisional loan by the City Council when it approved the overall budget of MLG&W has been questioned by at least one member of the City Council. In a letter written March 24, 2000, by Mr. Brent Taylor, Chairman, General Services and Utilities Committee, to Larry Thompson, Councilman Taylor states:

Tuesday, the members of the General Services and Utilities Committee received a copy of a light, gas and water document that appears to indicate some intention on the part of the division to 'slip' the \$20,000,000.00 loan by the Council. As Vice Chairman of the General Services and Utilities Committee last year and as Chairman this year, as I recall, representatives of light, gas and water did not make the Council aware of this significant expenditure of public funds during the budgeting process. In fact, to my knowledge, Council was not made aware of the Memphis Network project (other than what we read in the newspaper) until we received the franchise application in January, 2000. . . .

As the Council continued to consider this, and as you are not aware, several Committee members have expressed serious concerns that the nature, scope and terms of this project, and the manner in which it has been presented.

Councilman Taylor's letter is attached hereto as Exhibit 2.

Based upon the above, it is respectfully submitted that the \$20,000,000.00 loan, as well as the entry by MLG&W into the joint venture and the Operating Agreement, should have been approved by the City Council. As this approval was not obtained, these actions are ultra vires acts.

Respectfully submitted,

ALLEN, GODWIN, MORRIS,
LAURENZI & BLOOMFIELD, P.C.
200 Jefferson Avenue, Suite 1400
Memphis, Tennessee 38103
(901) 528-1702

BY: 
LEE J. BLOOMFIELD #8851

BY: 
DEBORAH GODWIN #9972

CERTIFICATE OF SERVICE

I, Lee J. Bloomfield, do hereby certify that on May 5, 2000, a copy of the foregoing document was served on the parties of record listed below via facsimile and U.S. Mail, postage prepaid, first class.

Richard Collier, Esquire
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0500

D. Billye Sanders, Esquire
Waller, Lansden, Dortch & Davis
511 Union Street, Suite 2100
Nashville, TN 37219-1750

John Knox Walkup, Esquire
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Guy Hicks, Esquire
Patrick Turner, Esquire
Bellsouth Telecommunications, Inc.
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300



LEE J. BLOOMFIELD

MEMORANDUM
of
UNDERSTANDING
between
MEMPHIS LIGHT, GAS AND
WATER DIVISION
and
LOCAL UNION NO. 1288
of
INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS

JANUARY 1, 1998

to

JANUARY 1, 2002



AFL-CIO & CFL

EXHIBIT

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MEMORANDUM OF UNDERSTANDING

THIS MEMORANDUM OF UNDERSTANDING, made and entered into this 1st day of January, 1998, by and between the MEMPHIS LIGHT, GAS AND WATER DIVISION, hereinafter referred to as the "DIVISION" and LOCAL 1288 of the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, affiliated with the American Federation of Labor and the Congress of Industrial Organization, hereinafter referred to as the "UNION."

WHEREAS, certain employees of the Division have designated the Union as their representative to deal with the Division in matters pertaining to wages, working conditions, and all other conditions of employment, and

WHEREAS, the City of Memphis, Tennessee, owns and operates its electric, gas and water systems and is engaged in supplying services to its schools, parks, playgrounds, streets, hospitals, public buildings, and in serving the public, these services being vital to the public health and welfare, and

WHEREAS, the Board of Commissioners was created to administer the affairs of the utility systems and the exclusive management, control and operation of said systems was imposed upon said Board of Commissioners, with the exclusive authority to engage, determine the number of, and fix the duties and salaries of all employees, and

WHEREAS, for the purpose of facilitating orderly and prompt settlement pertaining to wages, hours, working conditions, other conditions of employment, and grievances affecting these employees, this Memorandum of Understanding is made and constitutes the entire agreement between the Union and the Division.

City of Memphis

TENNESSEE

BRENT TAYLOR
Councilman - District 2

CITY COUNCIL

March 24, 2000

Mr. Larry Thompson
Senior Vice President
Memphis Light, Gas & Water
220 South Main
Memphis, TN 38103

RE: Memphis Network

Dear Larry:

I received a copy of the letter you requested from John Bobango regarding the Memphis Network project and felt the need to follow up.

Tuesday, the members of the General Services and Utilities Committee received a copy of a Light Gas & Water document that appears to indicate some intention on the part of the Division to "slip" the \$20,000,000 loan by the Council. As Vice-Chairman of the General Services and Utilities Committee last year and as Chairman this year, as I recall, representatives of Light Gas & Water did not make the Council aware of this significant expenditure of public funds during the budgeting process. In fact, to my knowledge, the Council was not made aware of the Memphis Network project (other than what we read in the newspaper) until we received the franchise application in January 2000. Additionally, I have questions over the intent and timing of your discussions with Councilman Bobango. These discussions were held at a time when it was known that his tenure on the Council was coming to a close, obviously creating an awkward situation for him.

As the Council continues to consider this, and as you are now aware, several Committee members have expressed serious concerns about the nature, scope and the terms of this project, and the manner in which it has been presented.

Sincerely,



Brent Taylor
Chairman, General Services and Utilities Committee